NOTES OF CASES.

Accident Insurance—"Surgeon" Does Not Include Veterinarian.—In Maupin *v.* Southern Surety Co., 220 S. W. 20, the Missouri Court of Appeals discusses the liability of an insurance company to the widow of a veterinary surgeon on a policy providing for liability in the event of injury to an insured physician, surgeon, or dentist while performing a surgical operation. Insured, in the instant case, while vaccinating some hogs and slitting the ears of those treated so as to distinguish them from the untreated ones, accidentally cut his finger, as result of which blood poison set in, resulting in his death.

The court said: "The controversy hinges on the construction of 'surgeon' and 'surgical operation' as used in the policy. * * * The word 'surgeon,' unqualified, in the mind of the ordinary individual, means one possessed of such knowledge of the human body, and such other knowledge as the laws of our land require, and possessed of such skill in the use of instruments that he may be expected with reason to correct or relieve some unnatural condition of the human body. We do not think that the 'mass of mankind' would connect the idea of a veterinarian with the word 'surgeon,' as that word is generally used. We would be doing violence to what we think is the only reasonable construction of the contract of insurance, when all the specifications are considered together, to say that the word 'surgeon,' as used in specification 12, is broad enough to include a veterinarian."

Husband and Wife—Right of Wife to Maintain Action against Husband for Infection with Venereal Disease.—In Crowell *v.* Crowell, 105 S. E. 206, the Supreme Court of North Carolina held that under a statute, which had been construed to confer upon the wife the right to maintain an action against her husband, a wife whose husband has wrongfully infected her with a venereal disease may maintain action against him for damages as for personal injuries.

The court said in part: "As the plaintiff's counsel well said, aside from the question of assault, it is a well-settled proposition of law that a person is liable if he negligently exposes another to a contagious or infectious disease (Skillings *v.* Allen, 143 Minn. 323, 173 N. W. 663, 5 A. L. R. 922); a fortiori the defendant would be liable in the present case whether guilty of an assault or not, and independent of the fraud or concealment. In Schultz *v.* Christopher, 65 Wash. 496, 118 Pac. 629, 38 L. R. A. (N. S.) 780, and in Bandfield *v.* Bandfield, 117 Mich. 80, 75 N. W. 287, 40 L. R. A. 757, 72 Am. St. Rep. 550 (cases cited by the defendant), the court recognized that the infection of the wife with venereal disease by the husband was a tort, but held that under their statutes, which differ from those in this state, the wife could not sue her husband for a tort upon her person. But

in Prosser *v.* Prosser (1920, S. C.) 102 S. E. 787, under a statute which is verbatim our revisal, § 408 (C. S. § 454), it was held that "under such statute a married woman can maintain an action in tort against her husband for an assault upon her," holding that, while it was otherwise at common law, a proper construction of this statute "gives to a wife every remedy against her husband for any wrong she might suffer at his hands. More than this, a wife has a right in her person; and a suit for a wrong to her person is a thing in action; and a thing in action is property, and is her property." And the action is therefore maintainable under Messervy *v.* Messervy, 82 S. C. 550.

"In Graves *v.* Howard, 159 N. C. 594, 75 S. E. 998, Ann. Cas. 1914C, 565, Allen, J. said:

" 'Revisal, § 408, further provides that the wife may maintain an action without the joinder of her husband: (1) When the action concerns her separate property; (2) when the action is between herself and her husband; and our court has construed this section to confer upon the wife the right to maintain an action against her husband. Shuler *v.* Millsaps, 71 N. C. 297; McCormac *v.* Wiggins, 84 N. C. 279; Manning *v.* Manning, 79 N. C. 293; Robinson *v.* Robinson, 123 N. C. 137; and Perkins *v.* Brinkley, 133 N. C. 158.'

"The defendant objects that this applies only to property rights concerned in actions, but damage or injury to her person is a property right. Our Statute, 1913, ch. 13, § 1, provides:

" 'The earnings of a married woman by virtue of any contract for her personal service and any damages for personal injuries, or other torts sustained by her, can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried.'

"This gives her the right of recovery of damages for any personal injury or other tort sustained by her, and there is no exemption of her husband from liability in an action by her which she is authorized to bring under Rev. § 408 (C. S. § 454). As long as the court held (Price *v.* Electric Co., 160 N. C. 450, 76 S. E. 502), that the recovery by the wife of damages for personal injuries was the property of the husband, it was useless for her to sue him under the right given by Rev. § 408 (2), but the act of 1913, chapter 13, making such damages her property, was promptly passed at the first session of the General Assembly thereafter curing this, and enabled the wife to maintain an action against her husband to recover damages for injuries committed upon her person by him.

"For the same reason that in State *v.* Fulton, supra, the court held that the statute making 'any one' liable to indictment for the slander of a virtuous woman made the husband liable to such indictment, notwithstanding the common-law theory, and even the express decision in State *v.* Edens, supra, to the contrary, we must hold that the statute of 1913 (chapter 13), and Rev. § 408, gave the wife

a right to recover damages for injuries to her person, or for other torts sustained by her, against her husband as fully as against any one else, as was held in Prosser *v.* Prosser, supra. In 26 R. C. L. 577, it is said:

" 'The fact that a case is novel does not operate to defeat a recovery if it can be brought within the general rules applicable to torts.'

"In Brown *v.* Brown (1914) 88 Conn. 42, 89 Atl. 889, 52 L. R. A. (N. S.) 185, Ann. Cas. 1915D, 70, that court pertinently says that—

" 'If the wife may sue for a broken promise, why may she not sue for a broken arm?'

"In Johnson *v.* Johnson, 201 Ala. 41, 77 South. 335, 6 A. L. R. 1031, the court held that the statute of that state, authorizing the wife to recover damages for injuries to her person or reputation, made the damages her separate property, and the statute which authorized her to sue alone for their recovery authorized her to sue her husband for such injuries and torts, abrogating the common-law fiction of identity between husband and wife to that extent. The statutes of that state upon that subject are almost identical with ours above quoted.

"Fiedler *v.* Fiedler, 42 Okl. 124, 140 Pac. 1022, 52 L. R. A. (N. S.) 189, held that a married woman could maintain an action against her husband for injuries received from a gunshot wound inflicted during coverture. That case, referring to Thompson *v.* Thompson, 218 U. S. 611, 31 Sup. Ct. 111, 54 L. Ed. 1180, 30 L. R. A. (N. S.) 1153, 21 Ann. Cas. 921, pointed out that the latter decision was based upon the statutes for the District of Columbia, which in this respect are not as liberal and progressive as in most of the states, and the court concurred in the dissenting opinion of Justices Harlan, Holmes, and Hughes (which in the opinion of the writer was the "big end" of the court at that time).

"In Gilman *v.* Gilman, 78 N. H. 4, 95 Atl. 657, L. R. A. 1916B, 907, it was held that the statute of that state, providing that a married woman may "sue and be sued on any contract by her made, or for any wrong done, as if she were unmarried," put husband and wife on an equality as to property, torts, and contracts, and that she could maintain an action against her husband for assault as fully as she could against any one else. In Fitzpatrick *v.* Owens, 124 Ark 167, 186 S. W. 832, 187 S. W. 460, L. R. A. 1917B, 774, Ann. Cas. 1918C, 772, the court held that a married woman may maintain an action against her husband for a tort, in that case for an assault, and when it resulted in a wrongful death her administrator could maintain an action therefor. And this is the trend of recent decisions throughout the country. 13 R. C. L. 1397, and notes, Ann. Cas. 1915D, p. 73."

Editorial note.—Two judges delivered a strong dissenting opinion in the principal case.

At common law no cause of action arose in favor of either husband

or wife by reason of any injury to the person or character of one committed by the other (Thompson *v.* Thompson, 218 U. S. 611, 31 Sup. Ct. 111, 54 L. Ed. 1180, 30 L. R. A. [N. S.] 1153, 21 Ann. Cas. 921; Peters *v.* Peters, 156 Cal. 32, 103 Pac. 219, 23 L. R. A. [N. S.] 699; Abbott *v.* Abbott, 67 Me. 304, 24 Am. Rep. 27; Bandfield *v.* Bandfield, 117 Mich. 80, 75 N. W. 287, 40 L. R. A. 757, 72 Am. St. Rep. 550; Strom *v.* Strom, 98 Minn. 427, 107 N. W. 1047, 6 L. R. A. [N. S.] 191, 116 Am. St. Rep. 387). This doctrine of nonliability is founded, not on the inability of the one spouse to sue the other, but on the principle that husband and wife are one person in law, and it is well exemplified in the cases which hold that a wife, after an absolute divorce from her husband, though she is then fully capable of suing him, still can maintain no action against him for a tort or wrong committed by him during the marriage relation against her person or character. Henneger *v.* Lomas, 145 Ind. 287, 44 N. E. 462, 32 L. R. A. 848; Libby *v.* Berry, 74 Me. 286, 43 Am. Rep. 589. So it is generally recognized that the Married Woman's Property Acts, which enlarge the rights of married women even to such an extent as to permit a wife to sue her husband, do not entitle her to sue him for an injury to her person or character after their marriage, for the reason that whether a husband is liable to his wife therefor is not a mere question of procedure, but of substantive right. Schultz *v.* Christopher, 65 Wash. 496, 118 Pac. 629, 38 L. R. A. (N. S.) 780; Brown *v.* Brown, 88 Conn. 42, 89 Atl. 889, 52 L. R. A. (N. S.) 185, Ann. Cas. 1915D, 70; Smith *v.* Smith, 73 Mich. 445, 41 N. W. 499, 3 L. R. A. 52, 16 Am. St. Rep. 594; Fielder *v.* Fielder, 42 Okl. 124, 140 Pac. 1022, 52 L. R. A. (N. S.) 189. And this is held true under a statute authorizing the wife to bring and maintain an action in her own name for any injury to her person or character, the same as if she were sole. Such a statute merely changes the procedure but gives no new right, and applies only to such causes of actions as could be maintained by the husband and wife as coplaintiffs before the statute took effect. Coleman *v.* Burr, 93 N. Y. 17, 45 Am. Rep. 160.

In Thompson *v.* Thompson, 218 U. S. 611, 31 Sup. Ct. 111, 54 L. Ed. 1180, 30 L. R. A. (N. S.) 1153, 21 Ann. Cas. 921, it was held that the common law relation between husband and wife was not so far modified as to give the wife a right of action to recover damages from her husband for an assault and battery committed by him upon her person, by Code D. C. § 1155, authorizing married women "to sue separately for the recovery, security, or protection of their property, and for torts, committed against them, as fully and freely as if they were unmarried.

In Deeds *v.* Strade, 6 Idaho 317, 55 Pac. 656, 43 L. R. A. 207, 96 Am. St. Rep. 263 it was held that a wife has no right of action against her husband for wrongfully and maliciously inoculating her with a venereal disease.

In Bandfield *v.* Bandfield, 117 Mich. 80, 75 N. W. 287, 40 L. R. A. 757, 72 Am. St. Rep. 550, where the husband communicated to his wife a loathsome disease, the court denied her right to sue, and said that: "In the absence of an express statute, there is no right to maintain an action at law for such wrong. We are cited to no authority holding the contrary. We cite a few sustaining the rule: Abbott *v.* Abbott, 67 Me. 304, 24 Am. Rep. 27; Freethy *v.* Freethy, 42 Barb. 641; Peters *v.* Peters, 42 Iowa, 182; Schultz *v.* Schultz, 89 N. Y. 644; Cooley, Torts (2d Ed.) p. 268; Schouler, Dom. Rel. p. 252; Newell, Defamation, p. 366; Townshend, Slander and Libel (3d Ed.) p. 548."

Libel and Slander—Communication by Former Employer to Surety Company Held Privileged.—In Hoff *v.* Pure Oil Co., 179 N. W. 891, the Supreme Court of Minnesota held that a communication in the form of questions and answers concerning the standing of a former employee, to a party who by his authority requested it, is privileged, and is not a publication of any libel contained therein for which the law affords a remedy, in the absence of proof of express malice.

The court said in part: "It is well settled that proof of the truth of an alleged libel is a complete defense in a suit for damages, where no special damages are pleaded. Thompson *v.* Pioneer-Press, 37 Minn. 285, 33 N. W. 856. See note, 21 L. R. A. 504. See note, 50 L. R. A. (N. S.) 1040. See note, 31 L. R. A. (N. S.) 133; 25 Cyc. 413, and cases cited. * * * "A communication in the form of questions and answers concerning the standing of a former employee, to a party who by his authority requested it, in the absence of express malice, is privileged, and is not a publication of any libel contained therein for which the law affords a remedy. Railway Co. *v.* Delaney, 102 Tenn. 289, 52 S. W. 151, 45 L. R. A. 600; 25 Cyc. 392; Billings *v.* Fairbanks, 136 Mass. 177; Beeler *v.* Jackson, 64 Md. 589, 2 Atl. 916; Hebner *v.* G. N. Ry. Co., 78 Minn. 289, 80 N. W. 1128, 79 Am. St. Rep. 387. The inquiry and the reply thereto were in the nature of a confidential communication. They were so labeled and treated, so far as appears from the record. They were issued at the special instance of the plaintiff. The only publicity given the answers contained therein was in making them known to the Guarantee Company. The record presents no evidence sufficient to justify a finding of express malice. It follows that the defendants were entitled to a directed verdict."

Streets and Highways—Rights and Liabilities of Owner of Minerals under Highway.—In Breich *v.* Locus Mountain Coal Co., 110 Atlantic, 242, the Supreme Court of Pennsylvania held that one who owns a fee in minerals under the surface of a highway and mines on the surface adjacent thereto, may work such mines in such a way as not to